

No. 16086 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WONG KWAI SING, by his next friend WONG LUM SANG,
alias WONG DAI CHUNG,

Appellant,

vs.

JOHN FOSTER DULLES, Secretary of State,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Jurisdiction of the Court.

This is an appeal from a judgment of the Court below entered in favor of defendant and against the plaintiff in an action for declaratory judgment of citizenship. Jurisdiction was invoked pursuant to the declaratory judgment statute, 28 U. S. C. 2201, and under the provisions of Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 1172, 8 U. S. C. 903. This Court has jurisdiction of an appeal from that decision pursuant to 28 U. S. C. 1291.

Statute Involved.

8 U. S. C., Section 903:

Judicial proceedings for declaration of United States nationality in event of denial of rights and privileges as national; certificate of identity pending judgment.

If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. If such person is outside the United States and shall have instituted such an action in court, he may, upon submission of a sworn application showing that the claim of nationality presented in such action is made in good faith and has a substantial basis, obtain from a diplomatic or consular officer of the United States in the foreign country in which he is residing a certificate of identity stating that his nationality status is pending before the court, and may be admitted to the United States with such certificate upon the condition that he shall be subject to deportation in case it shall be decided by the court that he is not a national of the United States. Such certificate of identity shall not be denied solely on the ground that such person has lost a status previously had or acquired as a national of the United States; and from any denial of an application for such certificate the

applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing the reasons for his decision. The Secretary of State, with approval of the Attorney General, shall prescribe rules and regulations for the issuance of certificates of identity as above provided. (Oct. 14, 1940, ch. 876, Title I, subch. V, Sec. 503, 54 Stat. 1171.)

Statement of the Case.

The issues presented to the trial court were two in number. The first was whether or not Wong Lum Sang alias Wong Dai Chung, alleged father of the plaintiff, is a native-born citizen of the United States. The second was whether or not the plaintiff, Wong Kwai Sing, is the blood son of said Wong Lum Sang, alias Wong Dai Chung.

The appellant claims that Wong Lum Sang was born in Honolulu, T. H., and thus was a native-born citizen of the United States. He also claims that he was born to said Wong Lum Sang and Lee Shee on May 15, 1921 in China. Appellant was refused a United States passport and filed this action for declaratory judgment of citizenship in the District Court. He was issued a certificate of identity under Section 503 of the Nationality Act of 1940, being Application No. 156, by the American Consul General in Hong Kong, China, September 10, 1951. He was admitted to the United States at San Francisco, California, on December 14, 1951 for the purpose of prosecuting this action in the courts of the United States.

At the trial below, the appellant presented himself, his alleged father, older brother, and sister-in-law as witnesses. Appellee presented no oral testimony, confining

itself to extensive cross-examination of appellant's witnesses. Three exhibits were admitted into evidence on behalf of the defendant-appellee. Two of these exhibits, marked A and B, are generally referred to as Immigration and Naturalization Service files, and the third exhibit C, is referred to as the passport file. Sixteen exhibits were admitted in evidence on behalf of appellant.

The District Court entered judgment in favor of the defendant-appellee, and the plaintiff appealed herein.

Summary of Argument.

I.

The findings of the trial judge should be binding unless clearly based on an obvious error of law or a serious mistake of fact.

II.

The evidence supports the trial court's finding that the testimony of Wong Lum Sang was not to be believed, and that there was no other believable evidence to prove the claim that said Wong Lum Sang was born in the Territory of Hawaii or in any other territory or state of the United States.

III.

The evidence supports the trial court's findings that the testimony of plaintiff Wong Kwai Sing was not to be believed and that there was no other believable evidence to prove the claim that said Wong Kwai Sing is the blood son of Wong Lum Sang.

ARGUMENT.

I.

Findings of the Trial Judge Should Be Binding Unless Clearly Based on an Obvious Error of Law or a Serious Mistake of Fact.

It is a well recognized principle that a trial judge's findings of fact are never to be lightly disturbed by a reviewing Court. Generally, appellate courts will not overturn findings of fact of the trial judge, since he has had an opportunity of hearing and observing the witnesses. This principle applies with striking appropriateness to the trial in the court below. Though the defendant-appellee presented no witnesses, it conducted an extensive cross-examination of all witnesses presented by plaintiff-appellant. The Court had the singular advantage of observing the demeanor of all witnesses and noting the important respects in which their testimony broke down when subjected to the scrutiny of cross-examination.

The findings of the trial judge must be given great weight and should be binding, unless clearly based on an obvious error of law or a serious mistake or misconception of a fact.

United States v. Rutherford, No. 15,979 (9th Cir., July 11, 1958);

Standard Oil Co. v. Shipowners' & Merchants' Tugboat Co., 17 F. 2d 366 (9th Cir.);

National Surety Co. v. Globe Grain & Milling Co., 256 Fed. 601 (9th Cir.);

Woodbury et al. v. City of Shawneetown, 74 Fed. 205 (7th Cir.);

Fidelity & Casualty Co. of New York v. Phelps et ux., 64 F. 2d 233 (4th Cir.).

II.

The Testimony of Wong Lum Sang Was Not to Be Believed, and There Was No Other Believable Evidence to Prove That He Was Born in the Territory of Hawaii, or in Any Other Territory or State of the United States.

Plaintiff Wong Kwai Sing claimed citizenship as a son of a native-born United States citizen. In order for plaintiff to prevail, he must have proved by a preponderance of evidence that, at the time of his birth, his alleged father Wong Lum Sang was a citizen of the United States by birth or naturalization.

Louie Hoy Gay v. Dulles, 248 F. 2d 421 (9th Cir., 1957).

As no claim of naturalization was made, plaintiff was required to prove by a preponderance of evidence that Wong Lum Sang was born within the United States or its territories.

The only evidence offered by plaintiff on this issue was (1) a statement of Wong Lum Sang himself that he was born in Honolulu, and (2) a Certificate of Identity issued by Immigration officials, and a Passport issued by the Department of State on the basis of said Certificate of Identity.

Considering first the documentary evidence, there is no evidence that any substantial investigation preceded the issuance of Certificate of Identity. There was no investigation conducted by the State Department pursuant to the issuance of the Passport. It was issued strictly upon the basis of the Certificate of Identity.

Evidence shows that the Certificate of Identity was issued to Wong Lum Sang merely upon his own statement

that he was born in Honolulu, Hawaii, of Lum Shee, mother, and Wong Ah Fong, father. There is no evidence whatsoever to substantiate his claim to said parentage and birth. There is no birth certificate, and no listing or use of his name or identity in documents of any form. The first record of existence of a person named Wong Lum Sang was in 1923 when he sought admission to Honolulu. Moreover, there is no credible evidence showing any association between his alleged mother, Lum Shee, and Wong Ah Fong—not to mention a valid marriage. Even the statements by two other persons substantiating his claim to identity are of extremely doubtful value. They were made by affidavit at the time he made his own claim. One was by a “distant uncle,” and the other, by another person unknown, and both were later able to give little or no information about either Wong Lum Sang himself or his family.

The so-called “documentary” evidence which is alleged to support this claim of parentage and birth consists of no more than the record of death in Honolulu of said Wong Ah Fong, and the departure records from Honolulu to the Chinese mainland aboard the steamer “DORIC” of a woman named Lum Shee and an unnamed child. These documents have no probative value as to the issue of whether he was actually the son of those alleged persons, or even whether he was the unidentified child listed on the departure records of the steamer “DORIC”.

The damaging truth is that other evidence points directly to the contrary. For example, as set forth in Wong Lum Sang’s Immigration and Naturalization file, seven other persons also entered Honolulu from the Chinese mainland claiming to be of the exact maternal parentage as Wong Lum Sang claimed, and also claimed to be that

exact child carried by said person Lum Shee which Wong Lum Sang also claimed to be. Wong Lum Sang, of course, claimed to be the only child of this parentage. It is also interesting to note that the records show three other persons who claimed to be sons of Wong Ah Fong, though these three did not claim the same mother as Wong Lum Sang and the other seven.

Certificates of Identity are not binding on the courts, nor need the courts even accept or believe their *prima facie* representations or evidentiary foundation. They merely constitute the *prima facie* right of the holder to remain in the United States. They do not prove, as in this case, that the holder was a citizen of the United States or even born in the place listed.

Louie Hoy Gay v. Dulles, 248 F. 2d 421 (9th Cir., 1957).

Decisions by Immigration officials are not *res judicata*.

Pearson v. Williams, 202 U. S. 281;

Mock Kee Song v. Cahill, 94 F. 2d 975 (9th Cir., 1938).

An alien cannot rely upon permissive entry to estop the United States in subsequent action against him when said permissive entry was gained by misrepresentation or concealment.

Landon v. Clarke, 239 F. 2d 631 (1st Cir., 1936);

United States ex rel. Jankowski v. Shaughnessey
186 F. 2d 480 (2d Cir., 1951).

Clearly plaintiff completely failed to prove by a preponderance of evidence that at the time of his birth or at any time, his alleged father was a citizen of the United States.

III.

The Testimony of Plaintiff Wong Kwai Sing Was Not to Be Believed, and There Was No Other Believable Evidence to Prove the Claim That Said Wong Kwai Sing Is the Blood Son of Wong Lum Sang.

Assuming that plaintiff could have proved that his alleged father, Wong Lum Sang, was a citizen of the United States, he still must have proved by a preponderance of evidence that he is the blood son of said alleged father. He should have been able to prove that a valid marriage existed between his alleged parents, that a child was born of this marriage, and that he is that child as demonstrated by continuing association between himself and his parents either through personal contact or by correspondence if they were separated. He showed none of these elements.

The evidence offered on the issue is full of discrepancies. The record contains scores of contradictions among testimonies of the various witnesses, and is filled with one incredible explanation after another—none worthy of belief.

The government would not seriously contend that plaintiff is not either from Bon Mee Yuen village or at least is familiar with the village and some of its citizenry. However, the evidence introduced at the trial below, instead of proving that he is the blood son of Wong Lum Sang, indicates strongly that he is not. Testimony as to the father's dealings with these alleged sons while they were in China is not only filled with contradictions by different witnesses and by the same witnesses themselves, but is questionable to the point of complete unbelievability.

The alleged father, Wong Lum Sang, testified that he never did write to his sons, nor did he even inquire in letters to his wife about the sons. He admitted that as late as 1937 he had sworn to Immigration officials that he had only three sons, and then testified that he did not know about the fourth son until this son was a mature man. The reason for this, he said, was that his wife on the advice of a fortune teller had not informed him that he had a fourth son. It should be noted that in his previous statements as indicated in the files, he alleged that his wife did not inform him of the existence of this alleged fourth son because the boy was sickly as a child and she feared he would die.

Plaintiff Wong Kwai Sing testified that he had in fact written to his father and had received letters from his father, and that the other sons had written and received letters from their father also. He said he had been writing to his father since he was five years old. Plaintiff, having listened to Wong Lum Sang's previous cross-examination may have altered his story to make the circumstances appear more credible. However, if all those letters were being sent back and forth, it would be utterly absurd to believe that the father would not know of the existence of his fourth son, or that he would not have preserved the only tangible link with and evidence of his family in China. The whole pattern of behavior is completely outside the realm of believability, no matter which story the Court believed.

The incredibility of the claimed dealings between the father and his alleged son is pointed up by the testimony regarding photographs. When Wong Lum Sang was pressed for an explanation as to how he recognized Wong Kwai Sing as his blood son when he visited China in 1948

after not seeing said plaintiff since 1923 when Sing was two years old, he stated that he had seen photographs of the boy. After being ordered by the Court to bring any such photographs into court, he produced, after a one-day recess, four photographs alleged to be of Wong Kwai Sing. He stated that these were sent to him by his wife, Lee Shee, but he could not remember when. Wong Kwai Sing in his cross-examination testified that these pictures were taken within approximately a year-and-a-half of each other, two of them when he was about 26 years old and the other when he was about 25 or 26 years old. He stated that these were the only pictures taken of him, that they were taken at a market about one-half hour away from the village, that he always went alone to have the pictures taken, but they were paid for by his mother. He stated that none of his alleged brothers ever went with him to the photographer nor did he ever go with them to have their pictures taken. Although his alleged father had stated that he never had asked for a picture, he stated that his alleged father had in fact asked for a picture of him. However, the same alleged father had never asked for pictures of any of the other boys. When asked whether he was the favorite son of Wong Lum Sang, he stated "no", that his father regarded them all the same. The only other picture which he admitted had ever been taken was a group picture which was alleged to have been taken after the father returned to the village for a visit in 1948. This picture is supposed to be a group including the father, mother, and No. 1, 3 and 4 sons.

Though the Court were to believe only the conflicting stories most favorable to the plaintiff, those versions themselves would show a pattern of behavior among the alleged father and sons completely incompatible with that

of a real Chinese family—specifically, the father and his sons.

Another unbelievable facet of plaintiff's testimony which was not helped by testimony of the other witnesses was his complete lack of knowledge of his paternal grandmother's family and background. This is even more striking when one considers that he testified that he lived with his grandmother. He went so far as to state on the witness stand that his grandmother not only had not told him of her family, but had not even told him of any stories of her youth.

There are other confusions and discrepancies in the testimony such as the plaintiff's assertion that he went to school 13 years in a 4- to 6-grade school, and that each of his brothers—all three of them—attended 9 years each; his failure to acknowledge knowing the sons of Wong Joe Kee, whose home he located as a neighbor to his home, his explanation being that "it is a big village." Another one was his inability to say what year he left the village, although he could remember that his father came in 1948 and that he left with his father, and although he could remember other things—even the location of the newest house in the village which he said was built 5 years before that. He became quite confused on cross-examination as to the time he spent in Hong Kong before his departure for the United States, although he seemed to remember other events which normally should be more obscure. His No. 2 brother, Wong Kai Yuen, did not agree with his own wife as to how long they spent in Hong Kong after they were married before they paid their visit to Bon Mee Yuen village. He stated six months once, five months another time—in other words five or six months—and his wife stated less than a month. The wife, Lee

Pui Yn also stated that she never heard of her husband's paternal grandparents.

Plaintiff submitted in evidence receipts for remittances sent by his alleged father to his alleged mother in the village which were addressed "to the mother of Wong Kwai Sing". The first inference to be drawn from this unusual designation is that the mother of Wong Kwai Sing and the wife of Wong Lum Sang were not one and the same person. When asked about this matter, Wong Lum Sang asserted that he had designated the payee as the mother of his No. 3 son rather than the mother of his eldest son, as would be customary, because his eldest son was working away, although the testimony and records indicate that the eldest son never left the village.

Conclusion.

Everything considered, the evidence submitted to the Court below shows no facts which would prove citizenship, but a fabricated story which breaks down in important respects when subjected to the scrutiny of cross-examination. Nor are the exhibits offered by appellant probative to the issue of his claimed citizenship.

Therefore, the Court did not err in its findings, and the Judgment should be sustained.

Respectfully submitted,

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